

### **REMARKS/ARGUMENTS**

Applicants respectfully request reconsideration of the present application in view of the above changes to the claims and the following remarks, which are responsive to the final Office Action mailed October 7, 2008.

#### **I. Status of Claims**

In the Office Action, Claims 1, 2, 4-7, 12, 16-22, and 24-28 were noted as pending in the application and were rejected. Applicants have amended independent Claims 1, 16, and 22 to further clarify the claimed invention, by incorporating the subject matter of dependent Claims 2, 28, and 24-25, respectively, therein. Accordingly, Applicants have canceled dependent Claims 2, 24-25, and 28. As independent Claims 1, 16, and 22 have been amended to incorporate the subject matter of dependent claims (i.e., Claims 2, 28, and 24-25) previously examined, Applicants respectfully submit that the amendments to Claims 1, 16, and 22 do not raise any new issues or introduce any new matter, and as such, should be considered by the Examiner and entered into the record of the present application. Applicants have also amended independent Claim 19 to correct a grammatical error and respectfully submit that the amendment does not raise any new issues or introduce any new matter, and as such, should be considered by the Examiner and entered into the record. As a result, Claims 1, 4-7, 12, 16-22 and 26-27 are currently pending.

#### **II. Rejection of Claims**

The Office Action rejected Claims 1, 4, 16, 22, and 26 under 35 U.S.C. § 102(a/e) as anticipated by U.S. Patent No. 6,665,810 to Sakai (hereinafter "*Sakai*"). The Office Action further rejected Claims 2, 19, 24-25, and 28 under 35 U.S.C. § 103(a) as being unpatentable over *Sakai* in view of U.S. Patent No. 6,405,256 to Lin et al. (hereinafter "*Lin*"). Claim 12 was rejected under § 103(a) as being unpatentable over *Sakai* in view of what was known in the art. Claims 5-7, 17-18, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over

*Sakai* in view of U.S. Patent No. 5,619,650 to Bach (hereinafter "*Bach*"); and Claims 20-21 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Sakai* in view of *Lin* combined with *Bach*.

**a. 35 U.S.C. 102 – *Sakai***

**i. Independent Claims 1, 16, and 22**

Applicants respectfully assert that *Sakai* does not teach or suggest each of the recitations of independent Claim 1, 16, or 22, as amended. In particular, Applicants respectfully assert that *Sakai* does not teach or suggest a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is less than or equal to the least of a first data transfer rate of the first host, a second transfer data rate of the second host, and a third transfer data rate of a network between the first and second hosts, as recited, albeit in somewhat different language, in independent Claims 1, 16, and 22, as amended. In fact, the Office Action concedes that *Sakai* "is silent on the network having a third data transfer rate and limiting the throttle value based on the third data transfer rate" (Office Action, Page 6). Based on the foregoing, Applicants respectfully submit that *Sakai* does not anticipate independent Claims 1, 16, or 22, as amended, and respectfully request that the rejection of these claims be withdrawn.

Additionally, Applicants note that independent Claims 1, 16, and 22, as amended, incorporate the subject matter of dependent Claims 2, 28, and 24-25, respectively. As dependent Claims 2, 24-25, and 28 were rejected by the Office Action as unpatentable over *Sakai* in view of *Lin*, Applicants will address the rejections of 2, 28, and 24-25 as they now pertain to amended Claims 1, 16, and 22, respectively, in the section below concerning those rejections.

**ii. Dependent Claims 4 and 26**

Claims 4 and 26 depend from independent Claims 1 and 22, respectively, and include all of the recitations of the base claims and any intervening claims plus their additional recitations

that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claims 1 and 22, it is respectfully submitted that dependent Claims 4 and 26 are further patentable over the reference cited as such dependent claims now depend from allowable base claims.

**b. 35 U.S.C. 103 – *Sakai* in view of *Lin***

**i. Independent Claim 19 and Independent Claims 1, 16, and 22, as amended (incorporating dependent Claims 2, 28, and 24-25, respectively)**

**1. *Lin* Does Not Determine a Network Data Transfer Rate Nor Throttle Based on Such a Rate**

Applicants respectfully assert that neither *Sakai* nor *Lin* teaches or suggests each of the recitations of independent Claim 1, 16, 19, or 22, as amended. In particular, neither reference teaches or suggests setting, obtaining, or receiving, during a communication start-up process, a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is less than or equal to the least of a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended. Again, the Office Action concedes that *Sakai* “is silent on the network having a third data transfer rate and limiting the throttle value based on the third data transfer rate” (Office Action, Page 6). Applicants, however, assert that *Lin*, similarly, fails to teach or suggest these recitations of Claims 1, 16, 19, and 22.

In the Office Action, the Examiner states that *Lin* discloses a “network having a third transfer rate and limiting the throttle based on the third data transfer rate” (Office Action, page 6). Applicants respectfully disagree with this statement for two reasons. First, the only disclosure of *Lin* that could be construed as “limiting the throttle” relates to an individual caching server somewhere in the network *adjusting its own* data transfer rate (*Lin*, Col. 8 lines 54-55; Figure 4). Applicants argue that “the throttle” recited in the independent Claims of the

present invention relate to a throttle *at the first, or source, host*. Specifically, Independent Claim 1 recites “a data throttle, wherein the data throttle limits *the first data transfer rate* [of a first host];” Claim 16 recites “transmitting data packets *from the first host* to the second host at a data transfer rate that is less than or equal to the throttle value;” Claim 19 recites “setting the maximum data transfer rate *of the source device* to the throttle value;” and Claim 22 recites “set[ting] a throttle value for transmission of data *from the first host* to the second host.” In all of these claims, the throttle occurs at the first, or source, host, not at some point within the network. Thus, since *Lin* does not teach or suggest limiting the throttle *at the first, or source, host* based on the third data transfer rate of the network, the combination of *Sakai* and *Lin* likewise fail to teach or suggest these recitations of independent Claims 1, 16, 19, and 22, as amended.

Second, even if, assuming *arguendo*, a caching server component of a network adjusting its own data transfer rate could be construed as a limiting throttle, the limiting of the transfer data rate in *Lin* is not based on the “third transfer rate of the network,” or any data transfer rate at all. In fact, nowhere in *Lin* is a data transfer rate determined for the network, let alone used as a basis for a throttle value limiting the data transfer rate from a first, or source, host. Instead, *Lin* discloses determining *network congestion* downstream from a specific caching server located somewhere within the network. The network congestion determination of the caching server is based on *packet loss rates*, not on data transfer rates (*Lin*, Col. 8 lines 34-45). As a result of *detecting network congestion downstream via packet loss rates*, an individual caching server may temporarily adjust its own data transfer rate. Nowhere, though, does *Lin* discuss adjusting a data transfer rate *based on the data transfer rate* of the network, or any type of data transfer rate such as the data transfer rate of the source or destination hosts. Temporarily adjusting the data transfer rate of a single caching server in the network based on *downstream packet loss rates* as in *Lin* is in no way equivalent to using the data transfer rate of the network, combined with the data transfer rate of the first and second hosts, to determine a throttle value for limiting the data transfer rate from a first, or source, host, as recited in independent Claims 1, 16, 19, and 22, as amended. Therefore, Applicants respectfully assert that the combination of *Sakai* and *Lin* does not teach or suggest these recitations.

2. Throttle of Data in Lin Does Not Occur at First, or Source, Host

Additionally, *Lin* discloses a system “having a network server connected to a client device through a communication network with one or more of [sic] caching servers ... [, where e]ach caching server can absorb network congestion in *its downstream connection* by ... varying the transmission data rate *in the down stream connection*” (*Lin*, Abstract) (*emphasis added*). Specifically, “*each caching server periodically determines whether network congestion exists in its downstream connection, and if network congestion exists, the caching server ... decreases the data transfer rate from the first rate to a second slower rate so that the data is not lost due to the congestion*” (*Id.*, Col 3. lines 11-16) (*emphasis added*). Therefore, in *Lin*, adjustments to the data transfer rate are not controlled by a throttle at the first, or source, host, but rather the adjustments occur at various positions *within the network* connecting the source and destination hosts, namely at each caching server between the network server and client device. This is not equivalent to limiting the data transfer rate *from a first host* to a throttle value that is less than or equal to the least of a first data transfer rate of a first host, a second transfer data rate of a second host, and a third transfer data rate of a network between the first and second hosts during a communication start-up period, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended.

3. Data Throttle Setup in Lin Does Not Occur During Communication Start-up Process

In addition to the preceding reasons, Applicants further contend that the combination of *Sakai* and *Lin* fails to teach or suggest the setting, obtaining, or receiving, “*during a communication start-up process,*” of a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is less than or equal to the least of a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended. As previously mentioned, in the Office Action, the Examiner concedes that *Sakai* “is silent on the network having a third data transfer rate.” Similarly, as argued above, *Lin* fails to determine a third data

transfer rate for the network. At best, *Lin* detects network congestion based on packet loss rates during the steady-state phase of data transmission, not during the initialization phase (*Lin*, Col. 2 lines 48-52; Col. 3 lines 8-10). Neither *Sakai* nor *Lin* discloses determining a third data transfer rate of a network at any point, let alone during a communication start-up process. Therefore, the combination of *Sakai* and *Lin* does not teach or suggest the setting, obtaining, or receiving, during a communication start-up process, of a throttle based at least in part on a third data transfer rate of a network between the first and second hosts as recited in some form or another in independent Claims 1, 16, 19, and 22, as amended.

#### 4. Not Obvious to Combine Sakai and Lin

Finally, Applicants submit that it would not have been obvious to combine the teachings of *Lin* with *Sakai*, as suggested by the Examiner. The “network” in *Sakai* is actually a physical cable connection between two known devices. One skilled in the art would know the maximum bandwidth requirements of the devices and select a cable with sufficient capacity, accordingly. The requisite motivation or suggestion to combine these references is actually lacking since the primary reference, i.e., *Sakai*, does not contemplate the need for considering data transfer rates of the network. Adding the network disclosed in *Lin* with caching servers for detecting network congestion between the devices would add unnecessary complexity to *Sakai*. Based on at least the foregoing reason, the combination is deficient and does not teach or suggest all of the features of independent Claims 1, 16, 19, and 22, as amended. Applicants therefore respectfully request the Examiner to reconsider and withdraw the rejections of these claims.

Based on the all of the foregoing arguments, Applicants respectfully assert that the combination of *Sakai* and *Lin* does not teach or suggest all of the recitations of independent Claims 1, 16, 19, and 22 and respectfully requests that the rejection of these claims be withdrawn.

#### **ii. Dependent Claims 2, 24-25, and 28**

Dependent Claims 2, 24-25, and 28 have been canceled. The rejection of these claims is, therefore, moot.

**c. 35 U.S.C. 103 – *Sakai* in view of what was known in the art**

**i. Dependent Claim 12**

Claim 12 depends from independent Claim 1 and includes all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claim 1, it is respectfully submitted that dependent Claim 12 is further patentable over the references cited as such dependent claim now depends from an allowable base claim.

**d. 35 U.S.C. 103 – *Sakai* in view of *Bach***

**i. Dependent Claims 5-7, 17-18, and 27**

Claims 5-7, 17-18, and 27 depend from independent Claims 1, 16, and 22, respectively, and include all of the recitations of the base claims and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claims 1, 16, and 22, it is respectfully submitted that dependent Claims 5-7, 17-18, and 27 are further patentable over the references cited as such dependent claims now depend from allowable base claims.

**e. 35 U.S.C. 103 – *Sakai* in view of *Lin* combined with *Bach***

**i. Dependent Claims 20-21**

Claims 20-21 depend from independent Claim 19 and includes all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claim 19, it is respectfully submitted that dependent Claims 20-21 are further

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patentable over the references cited as such dependent claims now depend from an allowable base claim.

### **III. Conclusion**

In light of the remarks above, Applicants respectfully submit that the application is in condition for allowance and respectfully requests that a Notice of Allowance be issued. The Examiner is encouraged to contact Applicants' undersigned attorney to resolve any remaining issues in order to expedite examination of the present application.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefore (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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